

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**Arthur Hernandez,  
individually and on behalf of  
others similarly situated,**

Plaintiff,

V.

**Counter Brands, LLC d/b/a/  
Beautycounter,**

Defendant.

**Case No.:**

## CLASS ACTION

# CLASS ACTION COMPLAINT FOR

- 1. VIOLATIONS OF THE  
TELEPHONE CONSUMER  
PROTECTION ACT, 47  
U.S.C. § 227**
- 2. VIOLATIONS OF  
FLORIDA STATUTE §  
501.059**
- 3. VIOLATIONS OF  
FLORIDA STATUTE §  
501.601**

# JURY TRIAL DEMANDED

# INTRODUCTION

1. Plaintiff, Arthur Hernandez, brings this action against Defendant Counter Brands, LLC d/b/a Beautycounter (“Defendant”), to secure redress for violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, Florida Statute § 501.059, and Florida Statute § 501.601.
2. This is a putative class action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (the “TCPA”), Fla. Stat. §

501.059, and Fla. Stat. § 501.601.

3. Defendant manufactures and sells cosmetic products. To promote its services, Defendant engages in unsolicited marketing, harming thousands of consumers in the process.
4. Through this action, Plaintiff seeks injunctive relief to halt Defendant's illegal conduct, which has resulted in the invasion of privacy, harassment, aggravation, and disruption of the daily life of thousands of individuals. Plaintiff also seeks statutory damages on behalf of himself and members of the class, and any other available legal or equitable remedies.
5. Plaintiff makes these allegations on information and belief, with the exception of those allegations that pertain to Plaintiff, or to Plaintiff's counsel, which Plaintiff alleges on personal knowledge.
6. While many violations are described below with specificity, this Complaint alleges violations of the statutes cited in its entirety.
7. Unless otherwise stated, all the conduct engaged in by Defendant took place in the Southern District of Florida.

8. Any violations by Defendant was knowing, willful, and intentional, and Defendant did not maintain procedures reasonably adapted to avoid any such violation.

9. Unless otherwise indicated, the use of Defendants' name in this Complaint includes all agents, employees, officers, members, directors, heirs, successors, assigns, principals, trustees, sureties, subrogees, representatives, and insurers of Defendants' named.

#### **JURISDICTION AND VENUE**

10. Jurisdiction is proper under 28 U.S.C. § 1331 as Plaintiff alleges violations of a federal statute, the TCPA. Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2) because Plaintiff alleges a national class, which will result in at least one class member belonging to a different state than that of Defendant. Plaintiff seeks up to \$1,500.00 (one-thousand-five-hundred dollars) in damages for each call in violation of the TCPA, which, when aggregated among a proposed class numbering in the tens of thousands, or more, exceeds the \$5,000,000.00 (five-million dollars) threshold for federal court jurisdiction under the Class Action Fairness Act ("CAFA"). Therefore, both the elements of diversity jurisdiction and CAFA jurisdiction are present.

11. Venue is proper in the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1391(b) and (c) because Defendant is deemed to reside in any judicial district in which it is subject to the court's personal jurisdiction, and because Defendant provides and markets its services within this district thereby establishing sufficient contacts to subject it to personal jurisdiction. Further, Defendant's tortious conduct against Plaintiff occurred within the State of Florida and, on information and belief, Defendant has made the same phone calls complained of by Plaintiff to other individuals within this judicial district, such that some of Defendant's acts in making such calls have occurred within this district, subjecting Defendant to jurisdiction in the State of Florida.

#### **PARTIES**

12. Plaintiff is a natural person residing in the County of Palm Beach, City of Delray Beach, State of Florida.

13. Defendant is a company based in the City of Santa Monica, County of Los Angeles, State of California, conducting business in Florida.

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## THE TCPA

14. The TCPA prohibits: (1) any person from calling a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent. 47 U.S.C. § 227(a)(4)(A).
15. The TCPA defines the term "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 U.S.C. § 227(a)(4).
16. The TCPA regulations promulgated by the FCC define "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 C.F.R. § 64.1200(f)(12). In determining whether a communication constitutes telemarketing, a court must evaluate the ultimate purpose of the communication. *See Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).
17. "Neither the TCPA nor its implementing regulations 'require an explicit mention of a good, product, or service' where the implication of an improper purpose is 'clear from the context.'" *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012)).

18.As recently held by the United States Court of Appeals for the Ninth Circuit: “Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA ‘need not allege any additional harm beyond the one Congress has identified.’” *Van Patten v. Vertical Fitness Grp.*, No. 14-55980, 2017 U.S. App. LEXIS 1591, at \*12 (9th Cir. May 4, 2016) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (emphasis original)).

**FLA. STAT. § 501.059**

19.It is a violation of the FTSA to “make or knowingly allow a telephonic sales call to be made if such call involves . . . the playing of a recorded message when a connection is completed to a number without the prior express written consent of the called party.” Fla. Stat § **501.059(8)(A)**.

20.The statute defines “telephonic sales call” as a “telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods services, or obtaining information that will or may be used for the direct solicitation of a sale

of consumer goods or services or an extension of credit for such purposes.” Fla. Stat. § **501.059(1)(I)**.

21. A person will be defined as a “called party” if they are a “person who is the regular user of the telephone number that receives a telephonic sales call,” under Fla. Stat. § **501.059(1)(A)**.

22. An “unsolicited telephonic sales call” is one that is made other than in direct response to the express request of the person who is called. under Fla. Stat. § **501.059(4)(K)**.

**FLA. STAT. § 501.601**

27. The Florida Telemarketing law states that a “Commercial Telephone Solicitation” means: “other communication with a person where a gift, award, or prize is offered.” Fla. Stat. § 501.603(1)(b)(1).

28. “Other Communication” means a written or oral notification or advertisement transmitted through any means.

29. “Commercial telephone seller” means a person who engages in commercial telephone solicitation on his or her own behalf or through salespersons. Fla. Stat. § **501.603(2)**.

30. “Person” means a single human being and does not mean a firm, association of individuals, corporation, partnership, joint venture, sole proprietorship, or any other entity. Fla. Stat. § **501.603(7)**.

#### **GENERAL ALLEGATIONS**

31. At all times relevant, Plaintiff was an individual residing within the State of Florida.

32. At all times relevant, Defendants conducted business in the State of Florida.

33. On or around May 3, 2022, Plaintiff received a text from Defendant discussing Defendant’s lobbying efforts in Washington DC, and linked a vimeo video about the issue.

34. On or around May 23, 2022, Defendant sent Plaintiff a text promoting a sale called “The Friends and Family Event,” where Plaintiff would receive 25% savings if he purchased over \$250 in their products.

35. On or around June 26, 2022, Defendant sent Plaintiff a text to promote their “Creamy Concealer” where they described the product and advertised the savings Plaintiff could get if he purchased together with their other products.

36. On or around June 30, 2022, Defendant sent Plaintiff a text discussing a summer sale. In the text, Defendant outlined what was on sale and the savings Plaintiff could receive if he purchased Defendants products during this promotional sale.

37. Defendant sent multiple texts similar to the ones mentioned for several weeks between May 2022 and July 2022.

38. Defendant's text messages constitute telephone solicitation because it encouraged the future purchase or investment in property, goods, or services under 47 U.S.C. § 227(a)(4), and Fla. Stat. § 501.059(1)(I). i.e., attempting to sell Plaintiff beauty products.

39. Plaintiff received the text messages within this judicial district and, therefore, Defendant's violation of the TCPA occurred within this district. Upon information and belief, Defendant text other individuals residing within this judicial district.

40. At no point in time did Plaintiff provide Defendant with his express written consent to be contacted. This is in violation of 47 U.S.C. § 227(a)(5).

41. Defendant's unsolicited text messages caused Plaintiff actual harm, including invasion of his privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion.

42. Defendant's text messages also inconvenienced Plaintiff and caused disruption to his daily life.

43. Furthermore, Defendant's text messages took up memory on Plaintiff's cellular phone. The cumulative effect of unsolicited text messages like Defendant's poses a real risk of ultimately rendering the phone unusable for other purposes as a result of the phone's memory being taken up.

## **CLASS ALLEGATIONS**

### **PROPOSED CLASS**

44. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of himself and all others similarly situated.

45. Plaintiff brings this case on behalf of a Class defined as follows:

All persons within the United States who received any solicitation/telemarketing text messages from Defendant to said person's cellular telephone and such person had not previously consented to receiving such text messages within the four years prior to the filing of this Complaint.

46. Defendant and its employees or agents are excluded from the Class.

Plaintiff does not know the number of members in the Class but believes the Class members number in the several thousands, if not more.

### **NUMEROSITY**

47. Upon information and belief, Defendant has placed automated and/or prerecorded calls and/or text messages to cellular telephone numbers belonging to thousands of consumers throughout the United States without their prior express consent. The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

48. The exact number and identities of the Class members are unknown at this time and can only be ascertained through discovery. Identification of the Class members is a matter capable of ministerial determination from Defendant's call and text records.

### **COMMON QUESTIONS OF LAW AND FACT**

49. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

- (1) Whether Defendant sent text messages to Plaintiff's and Class members' cellular telephones;
- (2) Whether Defendant can meet its burden of showing that it obtained prior express written consent to make such text messages;
- (3) Whether Defendant's conduct was knowing and willful;
- (4) Whether Defendant is liable for damages, and the amount of such damages; and
- (5) Whether Defendant should be enjoined from such conduct in the future.

50. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendant routinely made text messages to telephone numbers assigned to cellular telephone services is accurate, Plaintiff and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

### **TYPICALITY**

51. Plaintiff's claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

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**PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

52. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

**PROCEEDING VIA CLASS ACTION IS SUPERIOR AND  
ADVISABLE**

53. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual Class members prosecuting their own separate claims is remote, and, even if every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases.

54.The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

## **COUNT I**

### **VIOLATIONS OF THE TCPA, 47 U.S.C. § 227(B)**

#### **(ON BEHALF OF PLAINTIFF AND THE CLASS)**

55.Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

56.It is a violation of the TCPA to make “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or pre-recorded voice ... to any telephone number assigned to a ... cellular telephone service ....” 47 U.S.C. § 227(b)(1)(A)(iii).

57.Defendant – or third parties directed by Defendant – used equipment having the capacity to dial numbers without human intervention to send

text messages to the cellular telephones of Plaintiff and the other members of the Class defined below.

58. These text messages were made without regard to whether or not Defendant had first obtained express permission from the called party to send such text messages.

59. Defendant has, therefore, violated § 227(b)(1)(A)(iii) of the TCPA by using an automatic telephone dialing system and/or pre-recorded voice messages to send non-emergency text messages to the cell phones of Plaintiff and the other members of the putative Class without their prior express written consent.

60. Defendant knew that it did not have prior express consent to send these texts and knew or should have known that it was using equipment that constituted an automatic telephone dialing system. The violations were therefore willful or knowing.

61. As a result of Defendant's conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiff and the other members of the putative Class were harmed and are each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and the class are also entitled to an injunction against future calls. *Id.*

**COUNT II**

**KNOWING AND/OR WILLFUL VIOLATION OF THE TCPA, 47 U.S.C.**

**§ 227(B)**

**(ON BEHALF OF PLAINTIFF AND THE CLASS)**

62. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

63. At all times relevant, Defendant knew or should have known that its conduct as alleged herein violated the TCPA.

64. Defendant knew that it did not have prior express consent to send these text messages and knew or should have known that its conduct was a violation of the TCPA.

65. Because Defendant knew or should have known that Plaintiff and Class Members had not given prior express consent to receive its text messages, the Court should treble the amount of statutory damages available to Plaintiff and the other members of the putative Class pursuant to § 227(b)(3) of the TCPA.

66. As a result of Defendant's violations, Plaintiff and the Class Members are entitled to an award of \$1,500.00 in statutory damages, for each and

every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

### **COUNT III**

#### **VIOLATIONS OF FLA. STAT. § 501.059**

#### **(ON BEHALF OF PLAINTIFF AND THE CLASS)**

67. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

68. Defendant – or third parties directed by Defendant – used equipment having the capacity to dial numbers without human intervention to make non-emergency text messages to the cellular telephones of Plaintiff and the other members of the Class in violation of Fla. Stat § 501.059(8)(A).

69. Under Fla. Stat § 501.059(1)(G), prior consent includes the signature of the called party, the telephone of the called party, as well as clear authorization to the person making or allowing the telephonic sales call to make the call. Defendant did not have prior express consent to call the cell phones of Plaintiff and the other members of the putative Class when these telephonic sales calls were made. *Id.*

70. Defendant has, therefore, violated Fla. Stat § 501.059(8)(A) AND Fla. Stat § 501.059(1)(G) by using an automatic telephone dialing system to send

non-emergency text messages to the cell phones of Plaintiff and the other members of the putative Class without their prior express written consent.

71. Defendant knew that it did not have prior express consent to send these text messages and knew or should have known that it was using equipment that constituted an automatic telephone dialing system. The violations were therefore willful or knowing.

72. As a result of Defendant's conduct and pursuant to Fla. Stat § 501.059(10)(B), Plaintiff and the other members of the putative Class were harmed and are each entitled to a minimum of \$500.00 in damages for each violation.

**VIOLATIONS OF THE FLORIDA TELEMARKETING ACT**

**(ON BEHALF OF PLAINTIFF AND THE CLASS)**

73. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

74. It is a violation of the Florida Telemarketing Act for a salesperson to send messages without prior consent.

75. These text messages were sent without regard to whether or not Defendant had first obtained express permission from the Plaintiff to make such texts.

76. Pursuant to Fla. Stat §501.625, Plaintiff and putative class persons are entitled to recovery of actual damages and/or punitive damages, including court costs, and attorney's fees.

**WHEREFORE**, Plaintiff, on behalf of himself and the other members of the Class, prays for the following relief:

- a. A declaration that Defendant's practices described herein violate the Telephone Consumer Protection Act, 47 U.S.C. § 227, Florida Statute § 501.059, and Florida Statute § 501.601;
- b. An injunction prohibiting Defendant from using a telephone dialing system to call and text message telephone numbers assigned to cellular telephones without the prior express permission of the called party;
- c. An award of actual and statutory damages; and
- d. Such further and other relief the Court deems reasonable and just.

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**TRIAL BY JURY**

77. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: September 19, 2022

Respectfully submitted,

BY: /S/ RYAN L. MCBRIDE  
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